No. 12465

United States
Court of Appeals
for the Ninth Circuit.

JOHN WALDON,

Appellant,

vs.

E. B. SWOPE, Warden, United States Penitentiary, Alcatraz, California,

Appellee.

Transcript of Record

**Appeal from the United States District Court,
Northern District of California,
Southern Division.**

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

JOHN WALDON,

#620 Alcatraz, California

In Propria Persona.

FRANK J. HENNESSY,

United States Attorney,
Northern District of California,
Post Office Building,
San Francisco, California,

Attorney for Respondent and Appellee.

In the Southern Division of the United States District Court for the Northern District of California

29233E

In the Matter of

The Application of John Waldon, for a Writ of Habeas Corpus.

PETITION FOR WRIT OF HABEAS CORPUS

To the Honorable Judge of the United States District Court for the Northern District of California, Southern Division:

The petition of John Waldon respectfully shows:

I.

That he is now imprisoned and restrained of his liberty by E. B. Swope, Warden of the United States Penitentiary, Alcatraz Island, California.

II.

That the cause or pretense of such imprisonment and restraint according to the best knowledge and belief of your petitioner, is by virtue of two judgments, commitments and sentences, copies of which are hereto annexed.

III.

That annexed hereto, marked and entered herein as petitioner's Exhibits A, B, C, D, E, and F, respectively, are the documents hereinafter described to which reference is herein made, the contents of

each of which said exhibits and the allegations therein contained are hereby adopted, incorporated herein and made a part of this motion as though fully copied and set forth at this point word for word, which said exhibits consist of the following documents as lettered:

A. "Exhibit A," is a certified printed Transcript of Record filed in this case, April 25, 1940, which said Record contains, the indictment, judgment and sentence and other evidence pertinent to this petition.

B. "Exhibit B," is a certified copy of a letter from D. H. Reed, clerk, of the District Court of the United States, for the Eastern District of Illinois, relating to the illegally collected fines on Counts 6 and 7.

C. "Exhibit C," is a certified copy of the Order, modifying sentence entered on September 29, 1944.

D. "Exhibit D," is a certified copy of the Order, modifying sentence entered on May 12th, 1949.

E. "Exhibit E," is a certified copy of the indictment, judgment and commitment, by virtue of which defendant was sentenced to serve one-day in the county jail.

F. "Exhibit F," is an order, per authority of the Director, Bureau of Prisons, aggregating the one day to the original sentence, permitting it to be served in the penitentiary.

IV.

Facts of the Case

On September 6, 1939, petitioner and two others were indicted in the District Court of the United States for the Eastern District of Illinois in seven counts charging offenses against the postal service (R 2-7). As indicated by the indictment, the charges grew out of an alleged attempt by petitioner and two others to rob a United States mail car. The first three (3) counts (R 2-4) charges the defendants with destroying certain mail matter, in violation of Section 194 of the Criminal Code (18 U.S.C. 317); the fourth counts alleged an assault with intent to rob mail clerk Guy O'Hern of the mail; the fifth count alleged an assault with intent to rob mail clerk Carl C. Boothman of the mail; the sixth count alleged an assault with intent to rob the said mail clerk O'Hern, and in attempting to effect such robbery did wound said mail clerk by the use of a dangerous weapon; the seventh count alleged an assault with intent to rob the said mail clerk Boothman, and in attempting to effect such robbery, did jeopardize the life of said mail clerk by the use of a dangerous weapon. Counts 4, 5, 6 and 7 were in violation of Section 197 of the Criminal Code (18 U.S.C. 320) (R 4-7).

From the filing of the indictment through to the denial of the motion in arrest of judgment, the defendant questioned at every opportunity the sufficiency of the evidence (R-18, 21). 26.

At the commencement of the trial defendant challenged the petit jury, on the ground that women had been improperly excluded from the jury panel. The challenge was overruled and thereafter such ruling was assigned as error. (Assignment of Error, Assignment 1, R. 32.)

Petitioner's two codefendants, on pleas of guilty were each sentenced to twenty-five (25) years imprisonment.

A trial was had as to petitioner and the jury returned a verdict of guilty on all counts. Petitioner was sentenced to imprisonment for the period of:

Five years from this date on each of Counts 1, 2, 3, 4 and 5—said sentences to run and be served consecutively with each other.

Twenty-five (25) years and ten thousand ($10,000,00.) dollars fine on the 6th count of said Indictment.

Twenty-five (25) years and ten thousand ($10,000.00) fine on the 7th Count of said Indictment —sentence on Counts 6 and 7 to run consecutively with each other but concurrently with sentence imposed on Counts 1, 2, 3, 4, 5 of said Indictment, and that said defendant stand committed to said Institution until payment of said fine, or until said defendant is otherwise discharged as provided by law. (R 27-28.)

No fine is provided for by Section 197 of the Criminal Code (18 U.S.C. 320).

On appeal to the Circuit Court of Appeals for

the Seventh Circuit the judgment of the District Court was affirmed. Counsel for appellant assigned five (5) errors, upon which reversal was sought. (R 32.) Only one of these assignments, however, was urged at the hearing before the Circuit Court of Appeals, because Counsel stated in his opening brief:

"The sole error relied on arises out of the admission of highly prejudicial evidence at the trial, over the defendant's objection; namely, the defendant's prior conviction for a misdeameanor." Judgment affirmed (114 F. 2d 982), certiorari denied (312 U.S. 681).

On August 13, 1941, the sum of $403.50 was realized from the sale of certain items of defendant's personal property, taken without warrant from his home in Chicago in August, 1939, and sold by the United States Marshal at Danville, Illinois, to satisfy the improperly assessed judgment of $20,000.00. This amount together with $150.00 in cash was turned over to the Clerk of the Court. ("Exhibit B.") On September 3, 1941, and again on September 27, 1941, the Clerk of the District Court forwarded by Trust Fund Voucher to the Division of Finance at Washington, D. C., an amount, including additional deposits on proceeds of sale totaling $833.50 ("Exhibit B").

On September 5, 1944, almost four years after the judgment of the Circuit Court of Appeals was entered, petitioner mistakenly filed in that Court

a "Petition for Rehearing or for Leave to Proceed on motion in the Trial Court for Resentence." In that document petitioner contended that only one offense was charged in the seven counts of the Indictment, and that the evidence was insufficient to support his conviction under Counts 1, 2 and 3. The Circuit Court of Appeals filed this petition.

On September 29, 1944, during the pendency of this proceeding in the Circuit Court of Appeals, the District Court, by whom the sentence was originally imposed, upon its own motion, amended the sentence by eliminating the assessment of fines on counts six (6) and seven (7), but leaving in force the sentence of imprisonment, entering the order nunc pro tunc as of February 5, 1940, the date of the original judgment. This order was entered in the absence of petitioner and his counsel and without notice to them.

On October 25, 1944, in a two judge, per curiam opinion, the Circuit Court of Appeals denied the petition on its merits. This opinion has never been officially reported.

Defendant then presented a petition for writ of certiorari. Counsel for the Government filed a memorandum in opposition. In this connection we respectfully call this Court's attention to the fact that Government Counsel, which included the present Associate Justice of the Supreme Court, Tom Clark, pointed out in their memorandum in opposition:

"The petition was filed approximately four years after the judgment of the Circuit Court of Appeals was entered. . . . In these circumstances it is settled that the Circuit Court of Appeals lacked power to entertain the petitioner's application as a petition for rehearing, for 'the case had passed beyond the control of the court' (Citing cases), continuing: To secure a judicial determination of the propriety of his sentences, petitioner may still file a motion for resentence in the District Court." Certiorari denied, 65 Sup. Ct. 683, rehearing denied 65 Sup. Ct. 910.

On May 2, 1944, when petitioner called the attention of the Judge of the Trial Court to the unlawful judgment, he replied by letter:

"I am wholly without jurisdiction in your case. Your remedies lie with the parole authorities and with the executive authorities, the latter of whom alone can extend executive clemency."

Although later, by letter of May 16, 1947, he stated:

"Any matter properly presented in open court will receive attention."

On September 24, 1948, petitioner filed a motion to vacate the void judgment of conviction under Section 2255, Title 28, U.S.C. The government moved to dismiss said motion.

Petitioner contended in that motion that the Court should rule that this cause comes within the express prohibitions of the phrase in section 2255, "that

the remedy by motion is inadequate or ineffective to test the legality of his detention," so that he may be permitted to apply for a writ of habeas corpus, forthwith. Petitioner believes that due to the particular factual elements in this case, i.e., the imposition of the illegal fine, its partial collection in the amount of $833.50, the modification of the sentence in his absence, without further disposition of the unauthorized sanction, other than that the government still holds it, would seem to bring it expressly within the prohibition embraced in the words "inadequate or ineffective."

Specifically the questions submitted in that motion were:

1. Under the Fifth and Sixth Amendments to the Constitution and under the inherent power of the United States Supreme Court to direct the administration of justice in the Federal Courts was it error, rendering invalid the judgment of conviction, for the court to exclude all women from the petit jury panel when such exclusion was arbitrary and without cause? Particularly after timely objection was made?

2 (a). Whether the total absence of any evidence to support conviction as to Counts 1, 2 and 3 vitiated jurisdiction of the court to impose sentence on such counts?

(b) Whether the court having imposed sentences on Counts 1, 2 and 3 had authority to cumulate such sentences?

3. Whether it was a violation of the double jeopardy provision of the Fifth Amendment for the Court to construe Section 197 of the Criminal Code as authorizing the imposition of separate, consecutive sentences under Counts 4 and 5 and of separate, consecutive sentences under Counts 6 and 7, and to impose such sentences?

4. Whether under the due process of law clause and the double jeopardy provision of the Fifth Amendment to the Constitution, a sentence imposing both imprisonment and fine, where the statute authorized imprisonment only, was void?

5. Where the Court having authority to impose imprisonment only imposed both imprisonment and fine, does the partial payment of the fine by distraint of personal property, violate the double jeopardy provision and due process clause of the Fifth Amendment to the Constitution?

6. Whether a District Court, having sentenced the petitioner in a criminal proceeding to imprisonment and fine, under a statute permitting the imposition of imprisonment only, may amend the sentence in the absence of defendant and without notice to him, after partial payment of the fine by distraint of personal property?

7. Whether the form of the sentence is so vague and uncertain that any part thereof in excess of twenty-five (25) years is incapable of execution?

The Honorable Judge Lindley made tacit confirmation of petitioner's contentions that for purposes of sentence Counts 1, 2 and 3 would support only one valid sentence. He further made tacit confirmation of the contention that Count four (4) merged with Count six (6) and Count five (5) merged with Count seven (7). He made express confirmation of the contention that as a Matter of Law, petitioner, could not properly be sentenced to consecutive sentences on Counts six (6) and seven (7).

Judge Lindley found that at this late date, petitioner waived any right to object to the arbitrary elimination of women from the petit jury panel even where timely objection was made. Judge Lindley denied petitioner's contention, that the imposition and collection by distraint of the illegal fines, in addition to a definite term of imprisonment, subjected petitioner to double punishment, with the single bald statement, "Nor do I believe partial payment of a void fine entitles defendant to discharge from the valid part of his sentence."

Judge Lindley's "Findings of Fact and Conclusions of Law" are reported in 84 F. Supp. 449.

There are, therefore, two fundamental issues raised on this petition, the first of which is that the sentences on Counts six (6) and seven (7) are not authorized by the said statute and subject petitioner to double punishment.

A definite term of imprisonment and a $20,000.00

fine was imposed on petitioner, where the statutory penalty provided for imprisonment only. $833.50 of the illegally imposed fine was collected by distraint of personal property and covered into the United States Treasury. Several years later in the absence of petitioner and without notice to him, the Court vacated the illegally imposed fines without any reference to the money, which the government still retains. The question presented, is whether in these circumstances, the complete defect of such punishment, an invasion of petitioner's right to the Constitutional immunity from a second punishment for the same offense, is precluded by the due process of law clause and the double jeopardy provision of the Fifth Amendment.

The second of which issues is:

Under the Fifth and Sixth Amendments to the Constitution and under the inherent power of the United States Supreme Court to direct the administration of justice in the Federal Courts, was it error, rendering invalid the judgment of conviction, for the Court to exclude all women from the petit jury panel when such exclusion was arbitrary and without cause, particularly after time objection was made?

V.

That no previous application has been made for the writ below prayed.

VI.

The petitioner herein has as of July 1st, 1949, fully completed a sentence in excess of fifteen (15) years, taking into account deductions to which he was entitled (18 U.S.C.A. ##710, 713, 744h) and now and presently is being illegally and unlawfully restained and deprived of his liberty in violation of the Statutory Laws, the constitutional provisions of the Constitution of the United States, and the Amendments thereto.

VII.

Wherefore, your petitioner prays, that this Honorable Court enter an Order sustaining said petition granting the Writ of Habeas Corpus and discharge the petitioner from further custody of respondent, and from further illegal restraint of his liberty, as law and justice require.

Respectfully submitted:

/s/ JOHN WALDON,
Petitioner.

Verification

State of California,
County of San Francisco—ss.

John F. Waldon, being duly sworn deposes and says: That he is the petitioner in the above-entitled cause; That he has read the foregoing petition for writ of habeas corpus, that he knows the contents

thereof to be true of his own knowledge except as to the matters therein stated of information and belief, and as to those matters he believes them to be true.

Subscribed and sworn to before me this 8th day of October, 1949.

[Seal] /s/ PAUL J. MADIGAN,
Associate Warden, United States Penitentiary, Alcatraz, California.

Warden-Associate Warden authorized by the Act of February 11, 1938, to administer oaths.

Records at U. S. Penitentiary, Alcatraz, California, Indicate that John Waldon Is a Citizen of the United States.

[Endorsed]: Filed Oct. 20, 1949.

"EXHIBIT A"

Placita.

1. Pleas in the District Court of the United States Within and for the Eastern District of Illinois, at a special term thereof, begun and held in the United States court room, in the City of Danville, in said district, before the Honorable Walter C. Lindley, judge of said court, on the first Monday of December, in the year of our Lord one thousand nine hundred and forty and of the Independence of the United States of America, the one hundred and sixty fourth year.

D. H. REED,
Clerk.

Criminal No. 15076

THE UNITED STATES OF AMERICA,

vs.

JOHN FRANK WALDON, alias JOHN LARRY RANKIN, alias JAMES BAKER, alias JAMES KELLY, alias JOHN BERCOVITZ, alias JIMMIE DIXON, alias GEORGE A. DIXON, alias J. ROGERS, alias CHARLES DARNELL, et al.

* * *

Mr. Reznik: If the Court please, I would like to have an opportunity to call the Marshal with a view of ascertaining whether women were excluded from this venire.

The Court: This jury was selected last summer. The next jury will have women on it.

Mr. Reznik: At this time I wish to make an objection to the venire * * * and move to challenge the array for the reason that there were no women on the jury.

The Court: The motion is overruled.

Thereupon, the plaintiff to maintain the issues on its part, introduced the following evidence, to wit:

(All witnesses were duly sworn.)

* * *

And now opening statements of respective counsel are heard and evidence on behalf of the United States is heard and concluded and at the close thereof comes the Defendant, by his attorney, and moves the Court to direct the Jury to return a verdict finding him "Not Guilty" and after due hearing, the Court being fully advised in the premises,

It Is Ordered by the Court that said Motion be and the same is hereby denied.

And now evidence on behalf of the Defendant is heard and concluded and at the close thereof comes again the said Defendant, by counsel, and renews his motion for the Court to direct the Jury to return a verdict finding him "Not Guilty" and after due hearing and arguments of respective counsel, the Court being fully advised in the premises,

It Is Ordered by the Court that said Motion be and the same is hereby denied and now after hear-

ing all of the evidence in the case, the arguments of respective counsel and the instructions of the Court, the Jury retire in charge of a sworn officer to consider their verdict and afterwards comes the said Jury into Open Court and for verdict say:

"We, the Jury, find the Defendant, John Franklin Waldon, Guilty in manner and form as charged in the Indictment in this case."

And now comes the Defendant, by counsel, and moves the Court for a new trial, which motion, after due hearing, is by the Court overruled, to which ruling of the Court the said Defendant, by counsel, then and there excepts.

And now comes again the said Defendant, by counsel, and presents to the Court his motion in arrest of Judgment, which motion after due hearing is by the Court denied, and to which ruling of the Court the said Defendant, by counsel, then and there excepts.

[Endorsed]: Filed May 17, 1940.

"EXHIBIT B"

In the District Court of the United States
for the Eastern District of Illinois

Criminal No. 15076

THE UNITED STATES OF AMERICA

vs.

JOHN FRANK WALDON.

I, D. H. Reed, Clerk of the United States District Court for the Eastern District of Illinois, hereby certify that my Trust Fund Collection Account at Danville shows a deposit on July 29th, 1941, which was applied as part payment on John Waldon's fine in the sum of $280.00. This amount was paid to the Post Office Department, Third Assistant Postmaster General, Division of Finance at Washington, D. C., on September 3rd, 1941, under my Trust Fund Voucher No. 51-D, Trust Fund Check No. 2193, Item 2.

I further certify my Trust Fund Collection Account at East St. Louis, Illinois, shows that an additional deposit was made on September 23rd, 1941, by William Ryan, U. S. Marshal, representing proceeds of sales under execution on personal property and applied as part payment on John Waldon's fine in the sum of $553.50. This additional deposit of proceeds of sale was paid to the Post Office Department, Third Assistant Postmaster

General, Division of Finance, Washington, D. C., on September 27th, 1941, under my Trust Fund Voucher No. 66-E, Check No. 2206, Item No. 2. You will note that these two items of receipt and disbursement total $883.50, which was applied as payment to satisfy in part, the Judgment of the United States District Court for the Eastern District of Illinois, which imposed a $20,000.00 fine upon the said John Frank Waldon in the above-captioned cause.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said Court at Danville, Illinois, this 20th day of August, A.D. 1948.

[Seal] /s/ D. H. REED,
Clerk of the United States District Court for the Eastern District of Illinois.

[Endorsed]: Filed Aug. 20, 1948.

"EXHIBIT F"

Department of Justice
United States Penitentiary
Leavenworth, Kansas

Date October 27, 1943.

Hon. Frank R. Collins,
Assistant U. S. Attorney,
Topeka, Kansas.

Dear Sir:

In re: John Frank Waldon
our # 56411-L.

The following is quoted from letter of October 18, 1943, received from your office:

"So far as this office is concerned, the detainer may now be removed. However, the U. S. Marshal will want to take him into custody upon his release to serve one day in jail, and you should perhaps advise the Marshal when the subject's sentence terminates."

Commitment in Case # 7236, District of Kansas, was forwarded to this office by the U. S. Marshal, Topeka, Kansas, per his letter of 9-22-1943. The sentence of one day, for the attempted escape, has been aggregated with the original sentence of 50 years, changing the sentence to 50 years and one day, per authority of the Director, Bureau of Prisons, in his letter of October 9, 1943.

By the authority contained in the above-quoted letter the detainer has this date been withdrawn from our records.

Respectfully,

/s/ CARL F. ZARTER,
Record Clerk.

CC: Director, Bureau of Prisons
Inmate
File
U. S. Marshal, Topeka, Kansas.

Withdrawal—Federal Detainer

District Court of the United States,
Northern District of California

No. 29233-E

JOHN WALDON,

Petitioner,

vs.

E. B. SWOPE, Warden, United States Penitentiary, Alcatraz, California,

Respondent.

ORDER TO SHOW CAUSE

Good cause appearing therefor and upon reading the verified petition on file herein;

It Is Hereby Ordered that E. B. Swope, Warden of the United States Penitentiary, at Alcatraz

Island, State of California, appear before this Court on the 4th day of November, 1949, at the hour of 10 o'clock a.m. of said day, to show cause, if any he has, why a writ of habeas corpus should not be issued herein, as prayed for, and that a copy of this order be served upon the said Warden of the United States Penitentiary, at Alcatraz Island, State of California, by mail and that a copy of the petition and this order be served upon the United States Attorney for this District, his representative herein.

Dated: Oct. 25, 1949.

/s/ HUBERT W. ERSKINE,
United States District Judge.

[Endorsed]: Filed Oct. 25, 1949.

[Title of District Court and Cause.]

RETURN TO ORDER TO SHOW CAUSE

Comes now E. B. Swope, Warden of the United States Penitentiary, at Alcatraz, California, respondent herein, through Frank J. Hennessy, United States Attorney for the Northern District of California, and for cause why a Writ of Habeas Corpus should not issue herein, shows as follows:

I.

That the person hereinafter called "the petitioner," on whose behalf the Petition for Writ of

Habeas Corpus was filed, is detained by the respondent, E. B. Swope, as Warden of the United States Penitentiary, at Alcatraz, California, under and by virtue of the judgment and sentence and warrant of commitment duly and regularly issued in criminal cause numbered 15076 by the District Court of the United States for the Eastern District of Illinois on the 5th day of February, 1940, and by virtue of the judgment and sentence and warrant of commitment duly and regularly issued in criminal cause numbered 7237 by the District Court of the United States for the District of Kansas on the 26th day of August, 1943, and transfer order dated the 11th day of November, 1943, issued at Washington, D. C., by direction of the Attorney General of the United States, and signed by Frank Loveland, Assistant Director of the Bureau of Prisons of the Department of Justice of the United States of America;

II.

That attached hereto and made a part hereof, as "Exhibit A," are the following:

(1) Certified copy of indictment filed September 6, 1939, judgment and commitment issued February 5, 1940, order modifying sentence entered September 29, 1944, order denying motion to vacate judgment of conviction entered May 12, 1949, and docket entries, in the matter of the United States of America v. John Frank Waldon, alias, etc., in said criminal cause numbered 15076 in the

District Court of the United States for the Eastern District of Illinois;

(2) Copy of judgment and commitment issued August 26, 1943, in the matter of the United States of America v. John Frank Waldon, alias, etc., in said criminal cause numbered 7237 in the District Court of the United States for the District of Kansas;

(3) Copy of transfer order, as aforesaid;

(4) Copy of record of court commitment No. 620-AZ, United States Penitentiary, Alcatraz, California;

III.

That the contentions advanced by the petitioner in his application for writ of habeas corpus on file herein were, in substance, also urged by him in said criminal cause numbered 15076 before the District Court of the United States for the Eastern District of Illinois in his motion to vacate his judgment of conviction, which was decided adversely to him, as hereinabove set out, on May 12, 1949; that the Court in denying the motion to vacate the judgment of conviction also filed a memorandum opinion, reported in 84 Fed. Supp. 449, entitled "Waldon v. United States," which opinion is hereby referred to and incorporated herein as though set forth in full.

Wherefore, respondent prays that the petition for writ of habeas corpus herein be denied and the or-

der to show cause heretofore issued herein be discharged.

Dated: November 7th, 1949.

/s/ FRANK J. HENNESSY,
United States Attorney.

/s/ JOSEPH KARESH,
Assistant U. S. Attorney,
Attorneys for Respondent.

Exhibit A

(Copy)

(Indictment—Violation of Postal Laws)

In the District Court of the United States of America for the Eastern District of Illinois, September Term, A.D. 1939.

Eastern District of Illinois: ss—The Grand Jurors for the United States of America empaneled and sworn in the District Court of the United States of America, for the Eastern District of Illinois, at the September Term of said court in the year 1939, and inquiring for said district upon their oaths present: that

John Frank Waldon,
alias John Larry Rankin,
alias James Baker,
alias James Kelly,
alias John Bercovitz,

alias Jimmie Dixon,
alias George A. Dixon,
alias J. Rogers,
alias Charles Darnell.

James Arthur Tracy,
alias A. E. Hines,
alias Ralph E. Clark, and

John Blackwell
alias "Johnny,"

hereinafter called the defendants, on or about the 31st day of July, A.D. 1939, at or near Onarga, in the County of Iroquois, in the State of Illinois, in the Eastern District of Illinois, and within the jurisdiction of this Court, unlawfully, willfully, knowingly and feloniously did destroy certain mail matter, to wit: a certain letter bearing three cents (3c) in cancelled postage addressed to Mrs. Rose Holtzman, Conference Grounds, Cedar Lake, Indiana, postmarked at Onarga, Illinois, July 31, 1939, nine o'clock a.m., which said mail matter was a part of the United States mail then and there contained in an authorized depository for mail matter, to wit: Railway Post Office Car No. 328, being part of the Chicago and New Orleans Railway Post Office Train No. 31, operated by the Illinois Central Railway Company, which said mail matter had not theretofore been delivered to the person to whom it was sent and was then and there in the charge and custody of the United States Post Office estab-

lishment and in course of conveyance by mail from said Onarga, Illinois, to said Cedar Lake, Indiana.

Against the peace and dignity of the United States of America and contrary to the form of the statute of the same in such case made and provided.

/s/ ARTHUR ROE,
United States Attorney.

Count Two

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present: that

John Frank Waldon,
alias John Larry Rankin,
alias James Baker,
alias James Kelly,
alias John Bercovitz,
alias Jimmie Dixon,
alias George A. Dixon,
alias J. Rogers,
alias Charles Darnell,

James Arthur Tracy,
alias A. E. Hines,
alias Ralph E. Clark, and

John Blackwell,
alias "Johnny,"

hereinafter called the defendants, on or about the 31st day of July, A.D. 1939, at or near Onarga, in the County of Iroquois, in the State of Illinois, in the Eastern District of Illinois, and within the jurisdiction of this Court, unlawfully, willfully,

knowingly and feloniously did destroy certain mail matter, to wit: a certain letter bearing three (3c) in cancelled postage addressed to Mr. C. M. Wilson, 777 No. Meridian St., Indianapolis, Ind., postmarked Onarga, Illinois, July 31, 1939, nine-thirty o'clock a.m., which said mail matter was a part of the United States mail then and there contained in an authorized depository for mail matter, to wit: Railway Post Office Car No. 328, being part of the Chicago and New Orleans Railway Post Office Train No. 31, operated by the Illinois Central Railway Company, which said mail matter had not theretofore been delivered to the person to whom it was sent and was then and there in the charge and custody of the United States Post Office Establishment and in course of conveyance by mail from said Onarga, Illinois, to said Indianapolis, Indiana.

Against the peace and dignity of the United States of America and contrary to the form of the statute of the same in such case made and provided.

/s/ ARTHUR ROE,
United States Attorney.

Count Three

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present: that

John Frank Waldon,
alias John Larry Rankin,
alias James Baker,
alias James Kelly,

alias James Bercovitz,
alias Jimmie Dixon,
alias George A. Dixon,
alias J. Rogers,
alias Charles Darnell,

James Arthur Tracy,
alias A. E. Hines,
alias Ralph E. Clark, and

John Blackwell,
alias "Johnny,"

hereinafter called the defendants, on or about the 31st day of July, A.D. 1939, at or near Onarga, in the County of Iroquois, in the State of Illinois, in the Eastern District of Illinois, and within the jurisdiction of this Court, unlawfully, willfully, knowingly and feloniously did destroy certain mail matter, to wit: a certain letter bearing three cents (3c) in cancelled postage addressed to Mr. Elmer Jean, Campbellsburg, Indiana, R.F.D. No. 1, postmarked Onarga, Illinois, July 31, 1939, nine o'clock a.m., which said mail matter was a part of the United States mail then and there contained in an authorized depository for mail matter, to wit: Railway Post Office Car No. 328, being part of the Chicago and New Orleans Railway Post Office Train No. 31, operated by the Illinois Central Railway Company, which said mail matter had not theretofore been delivered to the person to whom it was sent and was then and there in the charge and custody of the

United States Post Office Establishment and in course of conveyance by mail from said Onarga, Illinois, to said Campbellsburg, Indiana.

Against the peace and dignity of the United States of America and contrary to the form of the statute of the same in such case made and provided.

/s/ ARTHUR ROE,
United States Attorney.

Count Four

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present: that

John Frank Waldon,
alias John Larry Rankin,
alias James Baker,
alias James Kelly,
alias John Bercovitz,
alias Jimmie Dixon
alias George A. Dixon,
alias J. Rogers,
alias Charles Darnell,

James Arthur Tracy,
alias A. E. Hines,
alias Ralph E. Clark, and

John Blackwell,
alias "Johnny,"

hereinafter called the defendants, on or about the 31st day of July, A.D. 1939, at or near Onarga, in the County of Iroquois, in the State of Illinois, in

the Eastern District of Illinois, and within the jurisdiction of this Court, unlawfully, willfully, knowingly and feloniously did assault a certain person having lawful charge, control and custody of mail matter of the United States, to wit, Guy O'Hern, who was then and there an employee of the Post Office Establishment of the United States, to wit: a railway postal clerk, who was then and there in charge of mail matter in an authorized depository for mail matter, to wit: mail car No. 328, being a part of Chicago and New Orleans Railway Post Office Train No. 31, operated by the Illinois Central Railway Company, said defendants then and there assaulting the said Guy O'Hern with the intent then and there to rob, steal and purloin the aforesaid mail matter of the United States, the said defendants then and there well knowing that said Guy O'Hern was an employee of the Post Office Establishment of the United States and in charge and custody of the aforesaid mail matter.

Against the peace and dignity of the United States of America and contrary to the form of the statute of the same in such case made and provided.

/s/ ARTHUR ROE,
United States Attorney.

Count Five

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present: that

John Frank Waldon,
alias John Larry Rankin,

alias James Baker,
alias James Kelly,
alias John Bercovitz,
alias Jimmie Dixon,
alias George A. Dixon,
alias J. Rogers,
alias Charles Darnell,

James Arthur Tracy,
alias A. E. Hines,
alias Ralph E. Clark, and

John Blackwell,
alias "Johnny,"

hereinafter called the defendants, on or about the 31st day of July, A.D. 1939, at or near Onarga, in the County of Iroquois, in the State of Illinois, in the Eastern District of Illinois, and within the jurisdiction of this Court, unlawfully, willfully, knowingly and feloniously did assault a certain person having lawful charge, control and custody of mail matter of the United States, to wit: Earl C. Boothman, who was then and there an employee of the Post Office Establishment of the United States, to wit: a railway postal clerk, who was then and there in charge of mail matter in an authorized depository for mail matter, to wit: mail car No. 328, being a part of Chicago and New Orleans Railway Post Office Train No. 31, operated by the Illinois Central Railway Company, said defendants then and there assaulting the said Earl C. Boothman with the intent then and there to rob, steal and pur-

loin the aforesaid mail matter of the United States, the said defendants then and there well knowing that said Earl C. Boothman was an employee of the Post Office Establishment of the United States and in charge and custody of the aforesaid mail matter.

Against the peace and dignity of the United States of America and contrary to the form of the statute of the same in such case made and provided.

/s/ ARTHUR ROE,
United States Attorney.

Count Six

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present: that

John Frank Waldon,
alias John Larry Rankin,
alias James Baker,
alias James Kelly,
alias John Bercovitz,
alias Jimmie Dixon,
alias George A. Dixon,
alias J. Rogers,
alias Charles Darnell,

James Arthur Tracy,
alias A. E. Hines,
alias Ralph E. Clark, and

John Blackwell,
alias "Johnny,"

hereinafter called the defendants, on or about the

31st day of July, A.D. 1939, at or near Onarga, in the County of Iroquois, in the State of Illinois, in the Eastern District of Illinois, and within the jurisdiction of this Court, unlawfully, willfully, knowingly and feloniously did assault a certain person having lawful charge, control and custody of mail matter of the United States, to wit: Guy O'Hern, who was then and there an employee of the Post Office Establishment of the United States, to wit: a railway postal clerk, who was then and there in charge of mail matter in an authorized depository for mail matter, to wit: mail car No. 328, being a part of Chicago and New Orleans Railway Post Office Train No. 31, operated by the Illinois Central Railway Company, said defendants then and there assaulting the said Guy O'Hern with the intent then and there to rob, steal and purloin the aforesaid mail matter of the United States, the said defendants then and there well knowing that said Guy O'Hern was an employee of the Post Office Establishment of the United States and in charge and custody of the aforesaid mail matter, and that said defendants in attempting then and there to effect such robbery, did wound said Guy O'Hern by the use of a dangerous weapon.

Against the peace and dignity of the United States of America and contrary to the form of the statute of the same in such case made and provided.

/s/ ARTHUR ROE,
United States Attorney.

Count Seven

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present: that

John Frank Waldon,
alias John Larry Rankin,
alias James Baker,
alias James Kelly,
alias John Bercovitz,
alias Jimmie Dixon,
alias George A. Dixon,
alias J. Rogers,
alias Charles Darnell,

James Arthur Tracy,
alias A. E. Hines,
alias Ralph E. Clark, and

John Blackwell,
alias "Johnny,"

hereinafter called the defendants, on or about the 31st day of July, A.D. 1939, at or near Onarga, in the County of Iroquois, in the State of Illinois, and within the jurisdiction of this Court, unlawfully, willfully, knowingly and feloniously did assault a certain person having lawful charge, control and custoday of mail matter of the United States, to wit: Earl C. Boothman, who was then and there an employee of the Post Office Establishment of the United States, to wit: a railway postal clerk, who was then and there in charge of mail matter in an authorized depository for mail matter, to wit: mail

car No. 328, being a part of Chicago and New Orleans Railway Post Office Train No. 31, operated by the Illinois Central Railway Company, said defendants then and there assaulting the said Earl C. Boothman with the intent then and there to rob, steal and purloin the aforesaid mail matter of the United States, the said defendants then and there well knowing the said Earl C. Boothman was an employee of the Post Office Establishment of the United States and in charge and custody of the aforesaid mail matter, and that said defendants did then and there in attempting to effect said robbery, put the life of the said Earl C. Boothman in jeopardy by the use of a dangerous weapon, to wit: a revolver.

Against the peace and dignity of the United States of America and contrary to the form of the statute of the same in such case made and provided.

/s/ ARTHUR ROE,
United States Attorney.

A true bill,

FRANK L. LAKE,
Foreman.

Filed in open court this .... day of ....., A.D. 19.....

[Endorsed]: Filed Sept. 6, 1939, U.S.D.C. Eastern District of Illinois, D. H. Reed, Clerk.

Bail, $25,000.00.

ARTHUR ROE,
U. S. Attorney.

District Court of the United States
Eastern District Illinois Division
Regular September, 1939, Term
No. 15076

UNITED STATES

vs.

JOHN FRANK WALDON, Alias, Etc.

Criminal Indictment in Seven Counts for Violation of U.S.C., Title 18, Secs. 320, 82 and 317, U.S.C.A.

JUDGMENT AND COMMITMENT

On this 5th day of February, 1940, came the United States Attorney, and the defendant, John Frank Waldon, alias, etc., appearing in proper person, and by Julius Reznik, his attorney, and,

The defendant having been convicted on Verdict of Guilty of the offense charged in the Indictment in the above-entitled cause, to wit, An Indictment of Seven Counts for Violation of Postal Laws, charging in 1st Count, Destroying Certain Mail Matter; 2nd Count, Destroying Certain Mail Matter; 3rd Count, Destroying Certain Mail Matter; 4th Count, Assault; 5th Count, Assault; 6th Count, Assault; and 7th Count, Assault, and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, It Is by the Court

Ordered and Adjudged that the defendant, having been found guilty of said offenses, is hereby committed to the custody of the Attorney General for imprisonment in an institution of the Penitentiary type to be designated by the Attorney General or his authorized representative for the period of

Five Years from this date on each of Counts 1, 2, 3, 4, and 5,—said sentences to run and be served Consecutively with each other.

Twenty-five Years and Ten Thousand ($10,000.00) Dollar Fine on the 6th Count of said Indictment.

Twenty-five Years and Ten Thousand ($10,000.00) Dollar Fine on the 7th Count of said Indictment—sentence on Counts 6 and 7 to run Consecutively with each other but Concurrently with sentences imposed on Counts 1, 2, 3, 4, and 5 of said Indictment, and that said defendant stand committed to said Institution until payment of said fine, or until said defendant is otherwise discharged as provided by law.

It Is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

/s/ WALTER C. LINDLEY,
Judge.

Examined and Approved:

/s/ RAY M. FOREMAN,
Assistant U. S. Attorney.

In the District Court of the United States
for the Eastern District of Illinois

No. 15076

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN FRANK WALDON,

Defendant.

ORDER

Now on this 29th day of September, A.D. 1944, it appearing to the Court from an examination of the records of this Court in the above-entitled case that a certain sentence was imposed upon the Defendant John Frank Waldon upon February 5th, A.D. 1940, wherein the said John Frank Waldon was sentenced to serve twenty-five years and pay a fine of $10,000 on Count Six of the indictment and to serve a term of twenty-five years and pay a fine of $10,000 on Count Seven of said indictment, the sentences on counts Six and Seven to run consecutively with each other but concurrently with sentence imposed by this Court on Counts One, Two, Three, Four and Five of said indictment.

And it further appearing to this Court that said sentences and fines imposed on Counts Six and Seven of said indictment related to offenses embraced within the provisions of Section 320, Title 18 of the United States Code and it further appear-

ing from an examination of the provisions of said statute that no provision is made therein for the imposition of fines, and that the imposition of fines was inadvertently made and not authorized.

Now Therefore, it is hereby Ordered that the imposition of sentence made by this Court against the said John Frank Waldon under date of February 5th, 1940, be modified to the extent of eliminating therefrom the assessment or imposition of fines on Counts Six and Seven of said indictment.

It is further Ordered by the Court that this order be entered nunc pro tunc as of February 5th, 1940.

Entered this 29th day of September, A.D. 1944.

/s/ WALTER C. LINDLEY,
U. S. District Judge.

Attest: A True Copy.

....., Clerk.

[Endorsed]: Filed Sept. 29, 1944, U.S.D.C., Eastern District of Illinois, D. H. Reed, Clerk.

In the District Court of the United States for the Eastern District of Illinois, Thursday, May 12th, A.D. 1949.

Present: Honorable Walter C. Lindley,
Judge.

Criminal Indictment No. 15076

Violation of Postal Laws

THE UNITED STATES OF AMERICA

vs.

JOHN FRANK WALDON, Alias JOHN LARRY RANKIN, Alias JAMES BAKER, Alias JAMES KELLY, Alias JOHN BERCOVITZ, Alias JIMMIE DIXON, Alias GEORGE A. DIXON, Alias J. ROGERS, Alias CHARLES DARNELL.

ORDER

And now on this 12th day of May, A.D. 1949, it appearing to the Court that said defendant John Frank Waldon, alias etc., has filed a motion to vacate the judgment of conviction under Section 2255, Title 28, U.S.C.,—and after being fully advised in the premises,—

It Is Ordered by the Court that the sentence upon Counts One, Two, Three, Four and Five will stand as originally entered; that the sentences upon Counts Six and Seven, shall run concurrently with each other and concurrently with the sentences im-

posed on Counts One, Two, Three, Four and Five, so that the total sentence of said defendant will be twenty-five years in all.

/s/ WALTER C. LINDLEY,
Judge.

[Endorsed]: Filed May 12, 1949, U.S.D.C., Eastern District of Illinois, D. H. Reed, Clerk.

Docket Entries

Cr. 15076

UNITED STATES

vs.

JOHN FRANK WALDON, et al.

1944

Sept. 29—Enter Order nunc pro tunc as of 2-5-1940, modifying sentence to the extent of eliminating therefrom, the assessment or imposition of fines of John Frank Waldon on Counts 6 and 7 of said Indictment.

1948

Aug. 20—File Certificate of Clerk in re: collections from Defendant John Frank Waldon.

Aug. 20—Certified copies of Order and certificate mailed to John Frank Waldon, Alcatraz, California.

Sept. 24—File Motion to Vacate Void Judgment and conviction of John Frank Waldon. (Copy to Ray M. Foreman, Danville, Illinois.)

1949

Apr. 6—File Motion of U. S. to Dismiss Motion to Defendant John Frank Waldon to vacate Void Jdg. and conviction. (Copy to Defendant.)

Apr. 18—Motion of Defendant John Frank Waldon for extension of time to file reply brief to 4-27-1949. (Copy to Ray M. Foreman, Danville, Illinois.)

Apr. 22—File Reply Brief of Defendant John Frank Waldon. (Copy to Ray M. Foreman.)

May 12—File Findings of Fact & Conclusions of Law "Sentence on Counts 1, 2, 3, 4 and 5 will stand; sentences on Counts 6 and 7 be fixed as they are now at 25 years each without fines and shall run concurrently with sentence imposed on Counts 1, 2, 3, 4 and 5, so that total sentence of defendant Waldon will be 25 years in all. Clerk will enter Judgment accordingly. In all other respects, motion is denied. (Copies to J. F. Waldon, #620 Alcatraz, California — The Attorney General, Washington, D. C.—U. S. Attorney, Danville, Illinois and U. S. Clerk, East St. Louis, Illinois.)

May 12—Enter Order in accordance with Findings of Fact and Conclusions of Law (Drawn).

District Court of the United States of America
Eastern District of Illinois

I, D. H. Reed, Clerk of the District Court of the United States for the Eastern District of Illinois, and keeper of the records and seals thereof, do hereby certify the foregoing to be a true copy of Indictment, filed September 6th, 1939; Judgment and Commitment, issued February 5th, 1940 and Order entered September 29th, 1944, in the matter of The United States of America vs. John Frank Waldon, alias, etc., in Cr. 15076, as fully as the same appears from the original documents now on file and orders now of record in this Court and in my hands as such Clerk. I further certify the docket entries listed herein are the only docket entries in the Danville Office in the above mentiond case.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, at my office in the City of Danville, in the District aforesaid, this 25th day of October A.D. 1949.

/s/ D. H. REED,
Clerk.

(Copy)

District Court of the United States
District of Kansas, First Division

No. 7237

Criminal indictment in one count for violation of U.S.C., Title 18, Secs. 753h.

UNITED STATES,

vs.

JOHN FRANK WALDON, with aliases: John Bercovitz, Jimmie Dixon, George A. Dixon, John Larry Rankin, Jamęs Baker, James Jelly, J. Rogers, Charles Darnell.

JUDGMENT AND COMMITMENT

On this 26th day of August, 1943, came the United States Attorney, and the defendant John Frank Waldon, with aliases, appearing in proper person, and by counsel appointed by the court, George Melvin, at Kansas City, Kansas and,

The defendant having been convicted on plea of guilty of the offense charged in the indictment in the above-entitled cause, to wit: attempt to escape from the United States Penitentiary at Leavenworth, Kansas, and the defendent having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, It Is by the Court

Ordered and Adjudged that the defendant, having been found guilty of said offenses, is hereby committed to the custory of the Attorney General or his authorized representative for imprisonment for the period of one (1) day, to begin at the expiration of the sentence he is now serving in the United States Penitentiary at Leavenworth, Kansas, and to run consecutive thereto.

It Is Further Ordered that said period of imprisonment be served in the county jail in the county within which the defendant is serving at the time of his release therefrom.

It Is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

O.K.

FRANK R. COLLINS,
Asst. U. S. Attorney.

/s/ STEPHEN S. CHANDLER, Jr.,
United States District Judge.

A True Copy. Certified this 20th day of September, 1943.

/s/ HOWARD F. McCUE,
Clerk.

By /s/ ADALINE WHITE,
Deputy Clerk.

A true record.

By /s/ C. W. SUNDSTROM,
Record Clerk, U.S.P. Alcatraz, California.

(Copy)

Administrative Form No. 66
November 1938

Department of Justice, Washington

November 11, 1943

To the Warden, United States Penitentiary, Leavenworth, Kansas

Whereas, in accordance with the authority contained in title 18, sections 744b and 753f, U. S. Code, the Attorney General by the Director of the Bureau of Prisons has ordered the transfer of John Frank Waldon, #56411 from the United States Penitentiary, Leavenworth, Kansas to the United States Penitentiary, Alcatraz, California.

Now Therefore you, the above-named officer, are hereby authorized and directed to execute this order by causing the removal of said prisoner, together with the original writ of commitment and other official papers as above ordered and to incur the necessary expense and include it in your regular accounts.

And you, the warden, superintendent, or official in charge of the institution in which the prisoner is now confined, are hereby authorized to deliver the prisoner in accordance with the above order; and you, the warden, superintendent, or official in charge of the institution to which the transfer has been ordered, are hereby authorized and directed to receive the said prisoner into your custody and him

to safely keep until the expiration of his sentence or until he is otherwise discharged according to law.

By direction of the Attorney General,
JAMES V. BENNETT,
Director, Bureau of Prisons.

/s/ FRANK LOVELAND,
Safer custody
Acting Assistant Director.

Original—To be left at institution to which prisoner is transferred.
A True Copy:

By /s/ C. W. SUNDSTROM,
Record Clerk, USP,
Alcatraz, Calif.
10-27-49

Record of Court Commitment
Department of Justice

Penal and Correctional Institutions
United States Penitentiary
Alcatraz, California

Inst. Name: John Frank Waldon
No. 620-AZ
Alias: John Bercovita, Jimmie Dixon, Geo. A. Dixon, John Larry Rankin, James Baker, James Kelly, James Harris, etc.
Color: White
Age: 48 (8-7-01)

True Name: Inst.

Name and number of prior commitments to Fed. Inst.: 56411-L (current case)

Offense: #1: P.O. Assault—Armed and Destroy Mail. #2: Attempt Escape from Leavenworth

District: #1: E — Illinois — Danville, Judge W. Lindley; #2: Kansas City, Kans., Judge Chandler, Jr.

Sentence: #1: 25 years & #2: 1 day

Costs Fine: None

Sentence changed: May 12, 1949

New term: 25 yrs, 1 day

Reason therefor: 50 yr sentence reduced to 25 yr by Court Order

Sentenced: #1: Feb. 5, 1940; #2: Aug. 26, 1943

When arrested: July 31, 1939

Committed to Fed. Inst.: Feb. 9, 1940—Leav.

Where arrested: Delray, Illinois

Sentence begins: Feb. 5, 1940

Residence: Chicago, Illinois

Eligible for parole: June 5, 1948

Time in jail before trial: Since arrest

Eligible for conditional release with good time: Jan. 21, 1957 (with part GT*)

Rate per mo. good time: 10

Total good time possible: 3000 days

Eligible for con. rel. with extra good time: Mar. 11, 1956 (with 316 days industrial good time earned to date)

Forfeited good time: June 10, 1943

Amount forfeited: (1523 days & 108 days IGT*)
Restoration good time: 12-4-47, 8-9-48
Amount restored: 730 and 730 days* (corrected by new Law)
Expires full term: Feb. 5, 1965

Former Commitments on Sentence to Other Institutions

No. B-4785
Name of Institution: State Reformatory
Location: Vandalia, Ill.
Type of Institution: Reformatory

Action of Board

Date: 9-49: Cont. xxx
10-14-49: Den. xxx

Releases and recommitments on present sentence other than parole

Date: 8-26-43
Method: WHC-AP, K.C., & retd.
Date: 3-19-44
Method: Trans. to Alcatraz
Statistics Tabulated: No detainers.

[Endorsed]: Filed Nov. 7, 1949, U.S.D.C., Northern District of California, Southern Division.

In the United States District Court for the Northern District of California, Southern Division

No. 29,233-E

In the Matter of the Application of

JOHN WALDON, for a Writ of Habeas Corpus.

TRAVERSE TO RETURN TO ORDER TO SHOW CAUSE

The above-named petitioner, John Waldon, in answer to the return of E. B. Swope, Warden of the United States Penitentiary, at Alcatraz, California, respondent herein, through Frank J. Hennessy, United States Attorney for the Northern District of California, to the writ of habeas corpus herein, respectfully shows that the commitment returned by the said E. B. Swope, Warden as aforesaid, as the cause of your petitioner's detention, is void and of no effect and was issued in violation of your petitioner's rights, privileges and immunities under the Constitution and laws of the United States for the reasons set forth in the petition for the issuance of the said writ, to which your petitioner now refers with the same force and effect as that the said petition were incorporated herein and set forth at length.

Government counsel presents its arguments strictly of course from the Government's point of view and properly so. But as a result it must be regarded with restraint, even caution for its fallacy lies in its lack of rationalization.

The Government does not deny that the petitioner is subjected to multiple punishment in violation of the Fifth Amendment, but predicates its sanctioning of such double punishment on the single bald statement of Judge Lindley, "Nor do I believe the partial payment of a void fine entitles defendant to discharge from the valid part of his sentence."

In so doing, the Government seeks to justify such complete defect by asserting that the fines were merely excessive and therefore presumably not punishment.

The Government resorts to the general rule that a sentence is legal so far as it is within the provisions of law and jurisdiction of the court and void as to the excess, when such excess is separable and may be dealt with, without disturbing the valid portion of the sentence. In order to bolster up such convenient reasoning, United States v. Pridgeon, 153 U.S. 48, is cited.

The argument is without merit since the Pridgeon case strongly supports petitioner's contention and is wholly consistent with the position taken here.

The fundamental flaw in the Government's seeking to adapt this case, lies in the fact that by weight of authority, such excess is separable only when the lawful part may be performed without performing the unlawful part. (39 C.J.S. 26 note 26.)

There are decisions, subsequent to and perhaps stemming from the Bonner and Pridgeon cases, where the words, "void as to the excess," were used,

but they were properly used. These were cases where two sentences had been improperly imposed for a single statutory violation. Such as the numerous bank robbery cases, the courts invariably holding that jeopardy does not attach until the prisoner is being subjected to a second punishment by the commencement of the illegal or excessive sentence and habeas corpus is not available until then. In such manner, perhaps, the use of the words "void as to the excess" arose. It is obvious that they may not properly be used in the present case.

In the instant case there is and can be no contention, but that the petitioner is subjected to punishment under both parts of this sentence at the present time.

No matter how strained a construction is attempted of the Pridgeon case, by Government Counsel, it is incapable of having read into it an intention on the part of the Supreme Court to lend itself to being a weapon of oppression for Government expediency rather than a bulwark against Government aggression.

Petitioner in his brief has cited many Supreme Court decisions holding that a sentence in a criminal case must conform directly to the statute and that any variation from its provisions either in the character or the extent of punishment inflicted, renders the judgment absolutely void. (Pet. Brief, pp 8-10 incl.)

In support of this same tenuous theory Government Counsel places its reliance on Fowler v.

Hunter, (C.A. 10). 167 F. 2d 548, which case is immediately distinguished from the present one since there was no fine paid. The complete defect in the instant case was not alone in the sentence as such but it was implemented by the collection of the fine. The partial payment of which was not a matter of choice, but of compulsion. The sanction of the fine being moreover of a different character than that provided by statute. Innumerable cases turn upon these distinctions.

The Government also urges that this partial payment of this illegal fine in addition to the sentence to imprisonment does not constitute double jeopardy, seeking to distinguish the Lange case and confine the ruling solely to the satisfaction of alternate punishments.

Petitioner's reliance on the Lange case and the precise ruling in such case is set forth in his brief. (Pet. Brief pp 3-4.) Petitioner urges in support of his contention, the basic principles so clearly enunciated upon which such ruling was established. As to this there can be no confusion. Petitioner has cited many Supreme Court cases stating plainly the exact principles upon which the Lange decision rests. (Pet. Brief pp 6-8.) It is these principles petitioner asks this Court to apply to the instant case.

The Constitutional prohibition is directed to multiple punishment, not as to whether such double punishment is an alternate sanction provided by statute.

In DeBenque v. United States, 85 F. 2d 202, the Court of Appeals for the District of Columbia, there stated, in footnote 4;

"It is to be noted that in Ex parte Lange the Supreme Court treated the judgment first rendered as erroneous, not absolutely void, notwithstanding the fact that it did not strictly pursue the terms of the penalty statute. This is no longer the rule as has been pointed out in the discussion of In re Mills and In re Bonner supra."

It becomes manifest that a sentence of imprisonment imposed in a criminal case without warrant of law puts the person sentenced in custody in violation of the Constitution. The answers seems to lie in the Supreme Court decision, In re Hans Nielsen, 131 U.S. 176, where Mr. Justice Bradley said:

"The objection to the remedy of habeas corpus, of course, would be, that there was in force a regular judgment of conviction, which could not be questioned collaterally, as it would have to be on habeas corpus. But there are exceptions to this rule which more than once have been acted upon by this Court. It is firmly established that if the court which renders a judgment has not jurisdiction to render it, either because the proceedings, or the law under which they are taken, are unconstitutional, or for any other reason, the judgment is void and may be questioned collaterally, and a defendant who is imprisoned under and by virtue of it may be discharged from custody on habeas corpus. * * * In

the cases of Lange and Snow, there was a denial or invasion of a constitutional right. A party is entitled to a habeas corpus, not merely where the court is without jurisdiction of the cause, but where it has no constitutional authority or power to condemn the prisoner.

"* * * In the present case, the sentence given was beyond the jurisdiction of the court, because it was against an express provision of the Constitution, which bounds and limits all jurisdiction."

Regardless what dialectical subtleties, what specious reasoning may be resorted to by Government Counsel, to explain away the critical language of the Lange case, the plain unvarnished truth of it is, the illegal sanction of the fine on each of the counts 6 and 7 is still double punishment precluded by the Fifth Amendment to the Constitution and violative of every judicial concept of common honesty.

Government Counsel has possibly as an afterthought, cited McNally v. Hill, 293 U.S. 131.

Petitioner believes, if the clearly defined principles of the Lange case are applied to the instant case, no *dec*ussion of the McNally case is necessary, if the principles of the Lange case are not applied, any discussion would be useless.

Throughout the whole history of these proceedings, Government Counsel, in opposition to both the earlier "Motion" and the present "Petition" has very carefully avoided any and all reference, by so little as a single word, phrase, or sentence, to the $833.50 secured through distraint of petitioner's

property and presently illegally held by the Government.

Petitioner, a layman unrepresented by counsel, believes that he may properly ask this Honorable Court, whether this singular reticence, this strange ommission is not more indicative of an utter lack of legality, than any authority petitioner could quote? Does it not suggest a consciousness of wrong, perhaps more persuasive to this Court than even a Government confession of error?

II.

The Government does not deny that the petit jury was improperly selected or that women were not intentionally and arbitrarily excluded therefrom. It answers the petitioner's claim that his constitutional rights were violated with the contention that such question may not be determined by application for a writ of habeas corpus. Government Counsel also adopts the Memorandum Opinion of Judge Lindley.

Petitioner submits that his brief fully and completely controverts each and every statement in the said Opinion, relative to this point and repeated discussion would not be helpful.

The Government further urges in support of its case the decision in Redman v. Squier, 162 F. 2d 195, where this Court of Appeals held that: "As far as the Ballard case, supra, is concerned, it is not authority for the proposition that a grand jury panel can be attacked by habeas corpus proceedings.

The objection should be made seasonably, by motion to quash, or some similar motion."

Little argument need now be devoted to the Redman case in view of the fact that the Court of Appeals for the Ninth Circuit later qualified their ruling in Rogers v. Squier 174 F. 2d 348, decided May 4, 1949. It may only be stated in passing that there are vital distinctions in the Redman case and the case at bar. The defendant in the Redman case had been denied leave to proceed in forma pauperis and the case was therefore not properly before the Court. The objection was to the composition of the grand jury panel and was raised for the first time on habeas corpus. In the case at bar the objection is to the legal constitution of the petit jury panel and appears on the face of the record (R. p 9).

That this question may be raised on habeas corpus proceedings would now appear to be incontestable.

Judge Holtzoff of the District of Columbia in United States v. Meyers, 84 F. Supp. 766, there ruled:

"It is the Court's view, therefore, that the extent of the Court's jurisdiction and authority under Section 2255 is coextensive with the jurisdiction of the Court passing on an application for a writ of habeas corpus. That this construction of the statute is correct is shown by the decisions of the Court of Appeals of the Fourth Circuit."

Judge Holtzoff's statement and that of Judge Parker of the Fourth Circuit have a peculiar importance because section 2255 was drafted by a

committee appointed by the Judicial Conference of the United States, and Judge Parker was chairman of that committee and Judge Holtzoff a member.

In this connection, on motions to vacate, under section 2255, the question of the arbitrary elimination of women from the jury panels has already been decided on its merits by the Courts of Appeals in the following cases: Wright v. United States, (C.A. 8) 165 F. 2d. 405; King v. United States, (C.A. -8) 165 F. 2d 408; York v. United States (C.A. -8) 167 F. 2d 847; Brown v. United States (C.A. 8) 165 F. 2d 409; Williams v. United States (C.A. 5) 168 F. 2d 866; Alger v. United States (C.A. 7) 171 F. 2d 667. It was also heard on the merits by the Court of Appeals for the Ninth Circuit in Dean v. United States 169 F. 2d 71.

It is obvious therefore since jurisdiction under section 2255 has been held to be coextensive with jurisdiction of the Court passing upon an application for a writ of habeas corpus, that this Court may properly decide this question.

The United States Court of Appeals for the Ninth Circuit has heard applications for a writ of habeas corpus on the jury question in Kelly v. Squier, 166 F. 2d 731 and Rogers v. Squier, 174 F. 2d 348 decided May 4, 1949, Rehearing denied June 9, 1949.

Since the decision in Rogers v. Squier, 174 F. 2d 348 was reached May 4, 1949, approximately two years after the holding in Redman v. Squier, 162 F. 2d 195 (May 16, 1947) relied upon by the Government, petitioner believes that Rogers v. Squiers,

supra, correctly states the law as it is presently, in the Ninth Circuit.

The holding there is not that this point may not be raised on habeas corpus, but that it is dependent upon whether the defendant has waived the point by failure to interpose suitable objection in the trial court.

From the language of the opinion it would seem obvious that had there been seasonable objection, the objection would have been sustained.

This Court of Appeals speaking through Judge Healy, there stated:

"Petitioner concedes that in the course of the proceeding in which he was convicted no point was made of the exclusion of women and no challenge of any sort interposed to the composition or authority of either the grand or petit jury functioning in his case." Continuing, "We have repeatedly held it is waived unless seasonable objection has been interposed in some appropriate way."

In all of the reported cases to which petitioner's attention has been directed, such was the sole basis of the ruling. Not that the question was necessarily ill founded as a legal criticism, but simply that since it had not been timely raised, it could not be presented for the first time, whether by direct appeal, by motion to vacate, by habeas corpus or by motion for new trial.

In the instant case such objection was properly made. (R., p. 9.)

Petitioner does not follow the Government's contention that assuming defendant's constitutional right to a jury trial has not been infringed upon there would be no resaon for this Court to issue the writ.

Pertinent to this respect is a consideration which the Government carefully refrains from arguing. Although petitioner was denied the right to have women on his petit jury, women had already been called for jury duty in the federal district courts in Illinois in United States v. Dressler, 112 F. 2d 972. In the Glasser case there were six women jurors on Glasser's petit jury. The Glasser case went to trial on February 5, 1940, the same day on which the petitioner in the instant case was tried and denied the right to have women jurors. It seems plain that this was a violation of petitioner's right to due process under the Fifth Amendment to the Constitution.

Petitioner believes that due to the unusual circumstances of this case, that is the Government's reliance on policies of expediency, rather than the preservation of legal and moral standards, that he may properly ask that costs be awarded him. He does so ask.

Petitioner submits that his brief fully and completely answers each and every contention made by the Government in its brief.

Petitioner submits that for the reasons stated in his briefs that the conviction and sentences are void; that if this Honorable Court should rule in

the converse, the only subsequent sentences that can now be sustained under the form of judgment heretofore set forth, are five years under Count 1, and five years under Count 4. Petitioner who many years ago had fully completed such sentences and is otherwise remediless, submits that he should be discharged.

Respectfully submitted,

/s/ JOHN WALDON,
Petitioner in propria persona.

State of California,
County of San Francisco—ss.

John Waldon, being duly sworn, deposes and says: That he has read the foregoing traverse and knows the contents thereof, and that the same is in all respects true.

Subscribed and sworn to before me this 21st day of November, 1949.

[Seal] /s/ PAUL J. MADIGAN,
Associate Warden, U. S. Penitentiary, Alcatraz, Calif.

Records at U. S. Penitentiary, Alcatraz, California, indicate that John Waldon is a citizen of the United States.

Warden-Associate Warden authorized by the Act of February 11, 1938, to administer oaths.

[Endorsed]: Filed Nov. 15, 1949.

[Title of District Court and Cause.]

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS AD SUBJICIENDUM

The petition for writ of habeas corpus filed by petitioner on October 20, 1949, is hereby denied upon the authority of the following cases:

McNally v. Hill, 293 U. S. 131, 55 S. Ct. 24;

Redmon v. Squier, 162 F. 2d 195;

Waldon v. U. S., 84 F. Supp. 449.

/s/ HERBERT W. ERSKINE,
U. S. District Judge.

[Endorsed]: Filed Nov. 23, 1949.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Sirs:

Please Take Notice, that the above named Petitioner hereby appeals to the United States Court of Appeals for the Ninth Circuit from the order of the United States District Court for the Northern District of California, Southern Division, entered in the office of the Clerk of the said Court on November 23, 1949, denying the Writ of Habeas Corpus in Case No. H. C. 29,233-E, and from each

and every part of said order as well as from the whole thereof.

Dated: November 29, 1949.

Respectfully submitted,

/s/ JOHN WALDON,
Petitioner-Appellant in
Propria Persona.

[Endorsed]: Filed Dec. 2, 1949.

[Title of District Court and Cause.]

STATEMENT OF POINTS

Now comes the Petitioner and Appellant above named and makes and files the following statement of points, to-wit:

(1) That the Court erred in dismissing and refusing to sustain the Writ of Habeas Corpus herein on the ground that:

(a) A definite term of imprisonment and a $20,000.00 fine was imposed on petitioner, where the statutory penalty provided for imprisonment only. $833.50 of the illegally imposed fine was collected by distraint of personal property and covered into the United States Treasury. Several years later in the absence of petitioner and without notice to him, the Court vacated the illegaly imposed fines without any reference to the money, which the government still retains. In these circumstances, the complete defect of such punishment, an invasion

of petitioner's right to the Constitutional immunity from a second punishment for the same offense, is precluded by the due process of law clause and the double jeopardy provision of the Fifth Amendment.

(b) Under the Fifth and Sixth Amendments to the Constitution and under the interent power of the United States Supreme Court to direct the administration of justice in the Federal Courts, it was error rendering invalid the judgment of conviction, for the court to exclude all women from the petit jury panel when such exclusion was arbitrary and without cause, particularly after timely objection was made.

(c) That it was a violation of the double jeopardy provision of the Fifth Amendment for the Court to construe Section 194 of the Criminal Code as authorizing the imposition of separate, consecutive sentences under Counts 1, 2 and 3 and to impose such sentences.

(d) That it was a violation of the double jeopardy provision of the Fifth Amendment for the Court to construe Section 197 of the Criminal Code as authorizing the imposition of separate, consecutive sentences under Counts 4 and 5 and in failing to hold that Count 4 merged with Count 6 and Count 5 merged with Count 7.

Dated: November 30, 1949.

/s/ JOHN WALDON,
Petitioner-Appellant.

[Endorsed]: Filed Dec. 2, 1949.

[Title of District Court and Cause.]

PRAECIPE FOR TRANSCIPT OF RECORD

To the Honorable Clerk of the above named Court:

Please prepare under the ruling of the Court a transcript of the record in the above-entitled case, to be filed in the office of the Clerk of the United States Court of Appeals for the Ninth Circuit, San Francisco, California, under Notice of Appeal from this District Court, and to include:

1. Petition for the Writ of Habeas Corpus, Exhibits "B" and "F," and from Exhibit "A" include only:
   a. Placita, page 1.
   b. Colloquy between Court and Counsel, page 9.
   c. Motion for directed verdict, page 26.
   d. Motion for a new trial, page 26.
   e. Motion in arrest of judgment, page 26.
2. Order to show cause.
3. Return to order to show cause and all respondent's exhibits.
4. Traverse to return to order to show cause.
5. Order of United States District Judge, Herbert W. Erskine, of November 23, 1949.
6. Notice of Appeal.

7. This praecipe for Transcript of Record and Statement of Points.

Dated: November 30, 1949.

Respectfully submitted,

/s/ JOHN WALDON,
Petitioner-Appellant in
Propria Persona.

[Endorsed]: Filed Dec. 2, 1949.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify the foregoing documents and accompanying Exhibit, are the originals filed in this Court, in the above-entitled case, and that they constitute the Record on Appeal herein, as designated by the Appellant, to wit:

Petition for Writ of Habeas Corpus Contains Exhibits B, C, D, E and F.

Order to Show Cause.

Return to Order to Show Cause Contains Exhibits.

Traverse to Return to Order to Show Cause.

Order Denying Petition for Writ of Habeas Corpus Ad Subjiciendum.

Notice of Appeal.

Statement of Points.

Praecipe for Transcript of Record.

Order Extending Time to Docket Appeal.

Exhibit A, accompanying Petition for Writ of Habeas Corpus.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 21st day of January, A.D., 1950.

C. W. CALBREATH,
Clerk,

[Seal] By /s/ M. E. VAN BUREN,
Deputy Clerk.

[Endorsed]: No. 12,465. United States Court of Appeals for the Ninth Circuit. John Waldon, Appellant, vs. E. B. Swope, Warden, United States Penitentiary, Alcatraz, California, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed January 21, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12,465

JOHN WALDON,

Appellant,

vs.

E. B. SWOPE, Warden, United States Penitentiary, Alcatraz, California,

Appellee.

Appeal from the Southern Division of the United States District Court for the Northern District of California

STATEMENT OF POINTS TO BE RELIED ON IN APPEAL AND AMENDED AND SUPPLEMENTAL DESIGNATION OF CONTENTS OF RECORD TO BE PRINTED

Pursuant to Rule 19 (6) of this Court, the appellant states that it intends to rely on the following points, to-wit:

(1) That the Court erred in dismissing and refusing to sustain the Writ of Habeas Corpus herein on the ground that:

(a) A definite term of imprisonment and a $20,000 fine was imposed on petitioner, where the statutory penalty provided for imprisonment only. $833.50 of the illegally imposed fine was collected by distraint of personal property and covered into the United States Treasury. Several years later in

the absence of petitioner and without notice to him, the Court vacated the illegally imposed fines without any reference to the money, which the government still retains. In these circumstances, the complete defect of such punishment, an invasion of petitioner's right to the Constitutional immunity from a second punishment for the same offense, is precluded by the due process of law clause and the double jeopardy provision of the Fifth Amendment.

(b) Under the Fifth and Sixth Amendments to the Constitution and under the inherent power of the United States Supreme Court to direct the administration of justice in the Federal Courts, it was error rendering invalid the judgment of conviction, for the court to exclude all women from the petit jury panel when such exclusion was arbitrary and without cause, particularly after timely objection was made.

(c) That it was a violation of the double jeopardy provision of the Fifth Amendment for the Court to construe Section 194 of the Criminal Code as authorizing the imposition of separate, consecutive sentences under Counts 1, 2 and 3 and to impose such sentences.

(d) That it was a violation of the double jeopardy provision of the Fifth Amendment for the Court to construe Section 197 of the Criminal Code as authorizing the imposition of separate, consecutive sentences under Counts 4 and 5, and in failing to hold that Count 4 merged with Count 6 and Count 5 merged with Count 7.

The appellant deems the following parts of the record as filed in the above entitled cause, necessary for the consideration of the points relied on.

1. Petition for the Writ of Habeas Corpus, Exhibits "B" and "F," and from Exhibit "A" include only:

a. Placita, page 1.
b. Colloquy between Court and Counsel, page 9.
c. Motion for directed verdict, page 26.
d. Motion for a new trial, page 26.
e. Motion in arrest of judgment, page 26.

2. Order to show cause.

3. Return to order to show cause and all respondent's exhibits.

4. Traverse to return to order to show cause.

5. Order of United States District Judge, Herbert W. Erskine, of November 23, 1949.

6. Notice of Appeal.

7. Praecipe for Transcript of Record and Statement of Points.

8. This designation.

Dated: February 6th, 1950.

Respectfully submitted,

/s/ JOHN WALDON,
Petitioner-Appellant in
Propria Persona.

[Endorsed]: Filed Feb. 7, 1950.